IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

THE NORTHERN TRUST COMPANY, JAMES A. RUSSELL, MAURICE E. GRAVES, AND E. LEROY HALL,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Opinions Below.

The opinion of the Court below (R. 80-90) is reported in 148 Federal (2d) 24.

The opinion of the District Court (R. 54-61) is reported in 56 Fed. Supp. 335.

Jurisdiction.

The judgment of the court below was entered on February 28, 1945. (R. 90-91.) Petition for re-hearing duly filed (R. 91) was denied on April 5, 1945. (R. 111.)

The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code as amended. (Sec. 347 (a), Chap. 9, Title 28, U. S. Code.)

Statement of the Case.

The facts are stated in the Petition for Certiorari to which reference is hereby had.

Errors to be Assigned.

1. The Court below erred in not holding that the trial court had the right and was required upon the present application to determine the question as to whether the Petitioner Bank is in commerce or affects commerce within the meaning of the National Labor Relations Act and specifically within the meaning of the commerce clause of the Federal Constitution.

2. The court below erred in affirming the judgment of the District Court, which latter judgment ordered the subpoenas to be obeyed without any showing that the Petitioner Bank was engaged in commerce or that its activities affected commerce.

3. The court below erred in holding that the subpoenas herein involved should be enforced where the Board's application for enforcement contained no allegation whatsover that Petitioner Bank is engaged in commerce or that its activities affect commerce and where counsel for the Board merely stated to the trial court that the Board had no knowledge upon the subject but that it wanted the documentary evidence and testimony in question for the purpose of finding out whether the Petitioner Bank is engaged in commerce or whether its activities affect commerce.

4. The court below erred in not holding that the Petitioner Bank is not to be deemed, as a matter of law, to be engaged in interstate commerce or that its activities are not to be deemed, as a matter of law, to affect commerce, but that in order to show that a question in commerce has

arisen it must be shown that in *fact* the local activity exerts a substantial economic effect on commerce.

5. The court below erred in not holding that if the National Labor Relations Act as a matter of construction precludes the District Court upon an application for the enforcement of the Board's subpoenas in connection with an investigation under Sec. 9(c) from inquiring into the question of coverage, and to that extent into the question of the Board's jurisdiction, the Act is to such extent unconstitutional.

6. The court below erred in not holding that upon the circumstances presented in the instant case and upon the Board's own application for enforcement, no question affecting commerce had been shown to have arisen concerning the representation of employees.

7. The court below erred in holding that Petitioner Bank, as a State bank, was subject to federal control beyond the right to regulate the public finance and particularly was within federal control as exercised by the National Labor Relations Act.

8. The court below erred in holding that federal control could be exercised as to Petitioner Bank under the National Labor Relations Act with respect to its protective force.

9. The court below erred in not holding that the Subpoena Duces Tecum herein involved was too broad and amounted to an unreasonable search and seizure.

Summary of Argument.

The issue before the Court upon the present application is as to the compulsory production of alleged documentary evidence and attendance of witnesses before an examiner of the National Labor Relations Board. The controversy is of a judicial character between the Board and Peti-

tioners to compel the production of evidence. The Board has no enforcement power of its own.

The District Court is given jurisdiction to enforce the subpoena of the Board only in those cases where the Board is conducting a hearing or investigation within the powers vested in the Board by Sections 9 and 10 of the Act. Section 9(c) grants no power to hear or investigate except only "whenever a question affecting commerce arises". Under Section 10 (a) of the Act the Board is empowered to prevent any person from engaging in an unfair labor practice affecting commerce, which power "shall be exclusive", but the order of the Board may not be enforced except upon review by the Court. (National Labor Relations Act, 29 U. S. C. A. 151, Secs. 9 and 10.) This right of judicial review given by the Act saves the constitutionality of the Act. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.)

In an investigation under Section 9 (c), that a question affecting commerce has arisen is jurisdictional. The Board's power to hear and investigate does not exist unless such a question has arisen, and there is no right to any judicial review unless it may be had upon the application to enforce.

The enforcement proceeding is a "lawsuit" in and of itself and is within the jurisdiction of the District Court either by virtue of the general grant of jurisdiction under Section 24 of the Judicial Code (U. S. C. A., Title 28, Sec. 41) or under Section 11 (2) of the Act, or both. Respondents are entitled to present all appropriate defenses and have them decided by the Court, including the issue of whether a question affecting commerce has arisen.

If, as a matter of construction, the District Court is precluded in an application by the Board for the enforcement of its subpoenas, in connection with an investigation under Section 9(c), to inquire into the question of coverage,

or specifically in the instant case to inquire into, and determine for itself, whether Petitioner Bank is engaged in commerce or whether its activities affect commerce, and to that extent to inquire into the Board's jurisdiction to proceed at all, the Act to that extent is unconstitutional. The holding of this Court in the *Myers* case dealing with Section 10 compels this conclusion.

A state bank is not necessarily engaged in commerce within the meaning of the National Labor Relations Act or the commerce clause of the Federal Constitution, nor does it necessarily affect such commerce, but in order to show that a question in commerce has arisen it must be shown that the local activity exerts a substantial economic effect on commerce. It is not enough to say that the local activity might affect commerce. Banking is not commerce *per se*.

It was the court's duty in this case to require proof of the jurisdictional fact which entitled the Board to an order enforcing its subpoena. It was not intended that the court act as a "rubber stamp" in such cases.

State banks are creatures of the several states. That state banks might in some way affect commerce would give the Congress no power to regulate their internal affairs under the commerce clause of the Constitution. The argument that a state bank as such has an economic effect upon interstate commerce so as to bring it within the general scope of the commerce clause proves too much. The same could be said about brokers, accountants, lawyers and even educational institutions.

The *subpoena duces tecum* served upon Petitioner Bank is too broad and amounts to an unreasonable search and seizure. It calls for the production of a vast collection of books, lists, reports, documents, statements and other records in an effort to discover evidence, and not for such documents as are evidence.

ARGUMENT.

I.

The Court Has the Right, and It Must, Upon the Present Application, Determine the Question as to Whether the Petitioner Bank Is in Commerce or Affects Commerce Within the Meaning of the National Labor Relations Act and Specifically Within the Meaning of the Commerce Clause of the Federal Constitution.

(a) The controversy here is of a judicial character between the Board, on the one hand, and Petitioners, on the other hand, to compel the production of evidence. Petitioners are entitled to present all appropriate defenses and have them decided by the court.

The court below construes the power of the Board to investigate the controversy, "whenever a question affecting commerce arises concerning the representation of employees" under Section 9(c) of the Act, the same as the power "to prevent any person from engaging in any unfair labor practice * * * affecting commerce" under Section 10(a) of the Act. (R. 83.) It is further said that although the Board's power under Section 10 is made exclusive, whereas there is no such provision in Section 9(c), the difference is immaterial. (R. 83.) It is said that moreover there is adequate opportunity for judicial review of any order which the Board enters under Section 10, and likewise any order resulting from the Board's ultimate action after investigation under Section 9(c), that in both cases to enforce obedience the Board must apply to the court, and that the investigation under Section 9(c) is merely preliminary. (R. 84.)

Obviously there is no question but that the Board, under Section 9(c), alone is empowered to investigate the contro-

versy *whenever* a question affecting commerce has arisen. However, at the stage of the proceedings where the Board has applied to the district court for enforcement of its subpoenas, the question is as to whether the Board has exclusive power to determine its own jurisdiction.

Under Section 10(a), in an unfair labor practice proceeding, this Court held that the Board had exclusive initial jurisdiction—*not exclusive final jurisdiction*—which latter was given to the Court of Appeals. Thus the constitutionality of the Act was saved. No such situation, however, exists with respect to section 9(c) of the Act.

As stated, the court below seemed to regard the right of appeal under section 10, which might involve the correctness of the Board's certification under section 9, as satisfying the requirement for a judicial review of the orders of the Board. But that review is of no avail when the question arises, as it does in the instant case, in an enforcement proceeding in the district court. Here there is no question of certification involved, nor is there any question involved as to an unfair labor practice under section 10. The action of the Board under section 9(c) is complete in itself, and as stated by this Court in *American Federation of Labor* v. *N. L. R. B.*, 308 U. S. 401, the Act "makes no provision in terms for review of a certification by the Board, and authorizes no use of the certification or of the record in a certification proceeding except in the single case where there is a petition for enforcement or review of an order restraining an unfair labor practice as authorized by section 19(c)." In other words, this Court held that the independent action of the Board under 9(c) was not open to review by the Court of Appeals under section 10 of the Act or under any provision of the Act except only where the certification became involved in an unfair labor practice order under section 10. It is hardly correct under these circumstances to say that under section 9(c) the investigation is merely preliminary.

The question before the court is not to be confused with one arising under an order of the Board against an employer. No such order has been entered. This is not a proceeding against The Northern Trust Company as an employer but on the contrary is a proceeding to enforce the subpoena of the Board served upon The Northern Trust Company, which happens to be the employer named in the petition, and three individuals who are not employers. The controversy here is whether the subpoena of the Board should be enforced, which is alone referred to the jurisdiction of the District Court.

Section 9(c) of the Act provides for an investigation whenever "a question affecting commerce arises concerning the representation of employees". Unlike Section 10 (a) which gives exclusive power to the Board to determine, in the first instance, whether the employer is subject to the Act, Section 9 contains no equivalent provision. Section 9(c) authorizes an investigation by the Board only if in fact and in law commerce is affected. Such requirement is jurisdictional. (National Labor Relations Act, 29 U. S. C. A. 151, Sec. 9(c).)

Under Section 10(a) of the Act the Board is empowered to prevent any person from engaging in any unfair labor practice affecting commerce, which power "shall be exclusive" and shall not be affected in any manner. But no order of the Board may be enforced until under Section 10 (e) the action of the Board is reviewed by the court, whose judgment and decree shall be final and binding upon the Board as well as the person complained against. Under Section 10 (f) any person aggrieved by the final order of the Board may obtain a review of such order in the Circuit Court of Appeals. (National Labor Relations Act, 29 U. S. C. A. 151, Secs. 10 (a), (b), (c), (e) and (f).)

The Board is without power to enforce obedience to its subpoena. In order to enforce obedience the Board must

apply to the court. Section 11 (2). *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49.

An enforcement proceeding is a "lawsuit" in and of itself and is within the jurisdiction of the District Court either by virtue of the general grant of jurisdiction under Section 24 of the Judicial Code (U. S. C. A., Title 28, Sec. 41) or under Section 11 (2) of the Act, or both. The final order of the District Court granting or refusing enforcement is final and appealable. That a petition against a witness to compel testimony or production of books makes a case or controversy to which the judicial power of the United States extends is well-recognized. The court in such a proceeding must necessarily determine all appropriate defenses. *Interstate Commerce Commission* v. *Brimson* (1894), 154 U. S. 447.

"In an enforcement proceeding any appropriate defense may be made." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49.

In *Cudahy Packing Co.* v. *N. L. R. B.* (C. C. A. 10), 117 F. 2d 692, it was said that the District Court had the right to ascertain that a proceeding is pending before the Board of which the Board has jurisdiction and that the respondent might defend against the application on the ground that the proceeding in which the evidence is sought "is not one of which the Board has jurisdiction." There the objection made to the subpoena was that the Board in its proceedings had been guilty of capricious, arbitrary and fraudulent conduct and that because of inordinate delay in the proceedings the Board had lost jurisdiction.

An order of enforcement concludes the "lawsuit". Such order in the nature of things could not be reviewed in connection with any subsequent certification by the Board or any review thereof in connection with an unfair labor proceeding under Section 10. And as to witnesses like the indi-

vidual respondents here, they have no right of review at any time under the Act itself nor any status of parties therein. And if the question as to the jurisdiction of the Board is not open to consideration by the District Court upon an application like the present, then by the same token the question would not be open to the Appellate Court on appeal from the District Court.

In *American Federation of Labor et al.*, v. *N. L. R. B.*, 308 U. S. 401, 412, this court reserved the question as to the reviewability of a certification under section 9(c) of the Act in an independent suit. In *Inland Empire District Council, etc., et al., Petitioners* v. *Millis, et al.*, No. 613, 1944 Term, decided June 11, 1945, ... U. S. ....., this court again declined to pass upon the question for the reason that that "question should not be decided in the absence of some showing that the Board has acted unlawfully". And that upon "the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law".

In that case, in Footnote 1, reference was had to the conflicting decisions in the lower Federal courts on the question of reviewability.

(b) As shown, in an enforcement proceeding under Section 11 of the Act in conjunction with an investigation under Section 9 (c), there is no statutory limitation or restraint upon the right and duty of the court to determine the basic question we have asserted. In *Interstate Commerce Commission, et al.* v. *City of Jersey City, et al.*, 322 U. S. 503, involving the Price Administration Act, this court said: "In the light of such history, this court has been reluctant to construe the emergency legislation as giving the Administrator standing to make mandatory demands upon other tribunals or to strip them of their usual discretions."

The court cited *Hecht Co.* v. *Bowles,* 321 U. S. 321, where the explicit question was whether the Price Administration Act had made mandatory upon the courts the duty of issuing injunctions. Nothing in Section 9 and Section 11 suggests that this court, in an enforcement proceeding like the present, is to be stripped of its judicial function in determining the issues presented by the application. Indeed this is no different from what this Court said in the *Myers* case to the effect that in an enforcement proceeding all appropriate defenses may be invoked.

If the only function of the Board is to prevent an unfair labor practice under Section 10 of the Act by filing a complaint and upon hearing and evidence taken to make a final order to cease and desist as provided in Section 10 (c), which order is subject to review by the court, then it might be said that action taken by the Board under Section 9 (c) is preliminary. But the Act is not to be so narrowly construed. The Board has two separate and distinct functions wholly independent of each other. One under Section 9 of the Act to determine the appropriate bargaining unit and certify the names of the representatives designated or selected for collective bargaining, which, it may be assumed for present purposes, is not reviewable by any court since the function is only administrative in character. The other under Section 10 of the Act to prevent an unfair labor practice, which may result in an order to cease and desist under Section 10 (c) and is and must necessarily be reviewable to have any binding effect. Under Section 9 (d) of the Act if the order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to Section 9 (c) and there is a petition for enforcement or review of such order, the record of such investigation shall be included in the transcript of the record and the decree of the court shall be made upon the plead-

ings, testimony and proceedings set forth in such transcript. This, it will be noted, is with respect to an order under Section 10 (c) of the Act, and, although an element in an unfair labor practice in case anything of that nature should occur, has nothing to do with the independent function of the Board in administering the Act under Section 9 thereof. In fact no unfair labor practice might ever occur and there might never be any petition for enforcement or review of an order preventing an unfair labor practice under Section 10 (c). It follows that the independent action of the Board under Section 9 (c) is in no sense a mere step in the prevention of an unfair labor practice under Section 10 (c).

If, as shown, Section 9 of the Act is complete in itself, consisting of the certification, after appropriate investigation and hearing, of the names of representatives for collective bargaining of an appropriate unit of employees, then it could not be said, as the Court below said (R. 84), that such action was a mere preliminary step in the entry of an order under Section 10 (c) of the Act to prevent an unfair labor practice and much less could it be said that there was an adequate opportunity for judicial review of action taken by the Board under Section 9, when, as shown, the only review granted by the Act is that of an order to prevent an unfair labor practice under Section 10. No one could claim under this interpretation of the Act that there is "adequate opportunity for judicial review" of the action of the Board under Section 9 (c) merely because the employer could or might refuse to bargain collectively with representatives of its employees or otherwise make itself subject to a possible charge of an unfair labor practice as defined by Section 8 of the Act. That the same question of jurisdiction might arise if a charge of an unfair labor practice were made under Section 10 of the Act could not be said to afford an

adequate opportunity for judicial review of action taken by the Board under Section 9 of the Act. No such charge might ever be made. There is no way the employer could have a judicial review without deliberately bringing about a charge of an unfair labor practice under Section 10, and then there is no assurance that a charge will be made. *This is not an adequate opportunity for judicial review.* The plain fact is that there is no direct appeal from action taken by the Board in a certification proceeding under Section 9 by virtue of anything contained in Section 10 of the Act.

(c) This very question was decided by this Court in *American Federation of Labor et al.* v. *National Labor Relations Board, supra,* where the question arose as to whether an appeal could be taken to the Circuit Court of Appeals from an order of the Board under Section 9 (c) of the Act certifying the names of the representatives designated or selected for the purposes of collective bargaining. In denying the right to appeal, it was said:

> "By the provisions of the Wagner Act the Board is given two principal functions to perform. One, defined by Section 9, which as enacted is headed 'Representatives and Elections,' * * *. The other, defined by Section 10, which as enacted, is headed 'Prevention of Unfair Labor Practices,' * * *.
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> "It is to be noted that Section 9, which is complete in itself, makes no provision, in terms, for review of a certification by the Board and authorizes no use of the certification or of the record in a certification proceeding, except in the single case where there is a petition for enforcement or review of an order restraining an unfair labor practice as authorized by Section 10 (e). * * *
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> "All other provisions for review of any action of the Board are found in Section 10 which as its heading indicates relates to the prevention of unfair labor practices. Nowhere in this section is there mention

of investigations or certifications authorized and defined by Section 9. * * *

"This brings us to the provisions for review of action taken by the Board in Section 10 (f) which is controlling in the present proceeding. That subdivision appears as an integral part of Section 10. All the other subdivisions relate exclusively to proceedings for the prevention of unfair labor practices. Both they and subdivision (f) are silent as to the proceedings or certifications authorized by Section 9. Section 10 (f), providing for review, speaks only of a 'final order of the Board.' * * *

"Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an 'order' of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by Section 10 may be reviewed by the court * * *. The other, authorized by Section 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. * * * The statute on its face thus indicates a purpose to limit the review afforded by Section 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms."

(d) The sole question then is whether the Board in this case has exclusive power to determine its own jurisdiction in the performance of its independent function under Section 9 (c) of the Act. When the Board invokes the jurisdiction of the District Court to enforce its subpoena power under Section 9 (c) of the Act by virtue of Section 11 of the Act, the jurisdiction of the Board must necessarily be brought into question because, as shown, there is no appeal or other review of the action which may be taken by the Board under Section 9 of the Act. To deny the District Court the power to determine the jurisdiction of the Board in such a proceeding is but to hold that the Board

has exclusive power to finally determine its own jurisdiction. It is elementary that the Federal Constitution does not permit vesting in an administrative body exclusive power to determine its own jurisdiction (cf. *Crowell* v. *Benson*, 285 U. S. 22), and it follows that when the Board invokes the jurisdiction of the District Court to enforce its subpoena, the Court must determine the question of the jurisdiction of the Board to exercise such subpoena power.

In the instant case the Board is claiming that the Petitioner Bank is subject to its investigatory powers under section 9(c) on the ground that a question affecting commerce has arisen, and it is consequently claiming that it has "jurisdiction" to make the investigation as against Petitioners. This claim is denied by Petitioners, and therefore there is an issue between the parties as to the Board's jurisdiction. The issue having been raised, the Board has called upon the District Court to exercise its judicial power in furtherance of the Board's assertion of jurisdiction while at the same time the Board, and the courts below, deny Petitioners the right to have the issue determined by the court or to have the question of the Board's jurisdiction inquired into at all by the District Court. The plain result is that Petitioner Bank is made defendant in a lawsuit involving a basic issue of the jurisdiction of the Board, and both courts below have held that the issue of jurisdiction can not be raised by Petitioner Bank in the suit and that therefore Petitioner Bank is to be denied the right in this lawsuit to interpose a material defense which otherwise would be appropriate.

As stated, the Court below regards the provision in section 10(a) giving the Board exclusive jurisdiction in an unfair labor practice proceeding subject to review by the court of appeals as immaterial, or in the alternative that there is to be implied in section 9 an equivalent provision. (R. 83-84.) That the provision as found in section 10(a)

is anything but immaterial appears from the *Myers* and *Newport News* cases, where that provision was deemed the controlling factor in precluding any resort to the district court in an independent suit to restrain the Board from conducting an unfair labor practice hearing where the employer claims that the Act did not apply to him. The jurisdiction of the district court otherwise existing was destroyed by the provisions found in section 10. Obviously, therefore, in the case of section 9, absent such a provision the jurisdiction of the district court is left unimpaired in any proceeding where its jurisdiction is properly invoked —here by the requested enforcement of the Board's subpoenas. And, furthermore, the courts are hardly at liberty to read into section 9(c) a provision giving exclusive jurisdiction to the Board to determine the question of coverage.

The Wage and Hour cases, while not in and of themselves controlling, are to be considered. The decisions, as they go, are in considerable conflict as to the duty and power of the District Court in such a case.

In *Walling* v. *Benson*, 137 F. 2d 501, it was held that the administrator under that Act had plenary power to make an investigation in aid of the enforcement of the Act and to issue subpoenas in connection with such investigation, but even there where coverage of the Act was denied *in toto* the Eighth Circuit required that the application for enforcement show probable cause for the Administrator's relief that the requisite coverage existed by proper allegations. If a showing of probable cause is necessary in a case where the Administrator has power to determine whether a violation of the Act has occurred, then where jurisdiction, as in this case, depends upon the very existence of whether a question in commerce has arisen, the fact would have to be established before the subpoena could be enforced. In the instant case the Board has no power to investigate the question of rep-

resentation at all unless there is a question in commerce. It is so expressly provided in the statute and necessarily the Board must establish its right to issue the subpoena by showing that such a question has arisen.

In both the Seventh and Eighth Circuits it has been held that where coverage is conceded under the Fair Labor Standards Act the Administrator need make no showing of probable cause that a violation of the Act has occurred. *Fleming* v. *Montgomery Ward Co.* (C. C. A. 7, 1940), 114 F. 2d 384; *Cudahy Packing Co.* v. *Fleming* (C. C. A. 8, 1941), 122 F. 2d 1005.

The Sixth Circuit has held that under an issue as to the coverage of the Fair Labor Standards Act the respondent was entitled to a hearing and determination in the District Court in the enforcement action. *General Tobacco & Grocery Co.* v. *Fleming* (C. C. A. 6, 1942), 125 F. 596.

In *Walling* v. *LaBelle Steamship Co.*, 148 F. (2d) 198, the same court held that the employer is not entitled to have the District Court inquire into the question as to whether seamen were subject to the Act. The court expressly stated in the *LaBelle* case that the employer conceded that it was engaged in commerce and was therefore subject to the Act.

In the above connection we note that this court has granted certiorari in *Oklahoma Press Publishing Co.* v. *Walling*, No. 1171, October Term, 1944, and *News Printing Co., Inc.* v. *Walling*, No. 1179, October Term, 1944, both of which cases involved the question of determining coverage in a wage and hour case in an application for enforcement of subpoenas.

It is claimed that the applicability of the Act to the Bank is one which the Board must decide initially for itself. In *Gray* v. *Powell* (1941), 314 U. S. 402, relied upon by the Board, this court specifically pointed out that Congress had

expressly authorized the Coal Commission to determine whether any commerce in coal was within the provisions of the Act subject to review by the Circuit Court of Appeals —a situation quite different from that arising under Section 9 (c) of the National Labor Relations Act.

Obviously the District Court in the present case must act judicially and in performance of its judicial function and must exercise a judicial discretion. The Board's contention in its final analysis is that the enforcement order must issue as a matter of course. That contention we deny.

The court below states: "Appellants have made a valiant effort to distinguish *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, but while they have pointed out certain factual differences, they have failed to demonstrate the inapplicability of the principle therein enunciated." (R. 84.) The *Endicott Johnson* case was decided under the Walsh Healy Act, a statute totally dissimilar from the National Labor Relations Act. Unfortunately the lower Federal courts have indicated a tendency to accept the *Endicott Johnson* decision as an all-inclusive and sweeping determination that all administrative subpoenas are to be enforced without regard to whether or not the Act is claimed to be inapplicable to some given employer or industry. To give any such construction of the *Endicott Johnson* decision to statutes wholly dissimilar to the Walsh Healy Act is to convert the district courts into mere "rubber stamps" for administrative agencies in the compulsory production of evidence.

We rather assume that the granting of certiorari in the two newspaper cases above was intended by this Court to afford an opportunity whereby it could clarify its decision in the *Endicott Johnson* case in its application to other statutes. Unquestionably the lower Federal courts have been led astray by an erroneous conception of the *Endicott Johnson* decision when other administrative agencies seek judicial enforcement of their subpoenas.

II.

A State Bank as Such Is Not Necessarily Engaged in Commerce Within the Meaning of the National Labor Relations Act or the Commerce Clause of the Federal Constition Nor Does It Necessarily Affect Such Commerce.

The court below misconceives the position of Petitioners in this case on the question as to whether the Petitioner Bank is engaged in commerce. The opinion below states (R. 85): "We refuse to lay down a blanket ruling, as Appellants in effect contend that we should, that as a matter of law no bank can be engaged in interstate commerce," citing the two bank cases involving the National Labor Relations Act and the Polish Alliance case. The court below is in error as to Petitioners' contention. Petitioners contend that banking as such is not commerce, and that the banking activities of a bank are not to be regarded as a matter of law as affecting commerce.

Banking as such is not commerce within the meaning of the National Labor Relations Act or the commerce clause of the Constitution. Much less is it to be said that a local state or Federal bank is necessarily engaged in interstate commerce or in an activity which affects such commerce within the meaning of the Act or of the commerce clause, or is so engaged as a matter of law.

Although activities may be intrastate in character, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress can not be denied the right to exercise such control, but the power to act upon activities of an interstate character may not be extended so as to embrace effects upon interstate commerce so remote that to embrace them would effectually obliterate the distinction between what

is national and what is local. It was so held in *Schechter* v. *United States*, 295 U. S. 495, and *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

In *Wickard* v. *Filburn*, 317 U. S. 111, this Court said that a broader concept was necessary for the full exercise of the Federal power, and that although the particular activity in question be local and might not be regarded as commerce, nevertheless such activity, whatever might be its nature, may be reached by the Congress if such activity exerted a substantial economic effect on interstate commerce. However, it would seem to be almost self-evident that the principle that a local activity is subject to Federal power if it exerts a substantial economic effect on commerce can only apply where the commerce affected is a known defined thing. Cf. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110; *Wickard* v. *Filburn*, *supra*. We find no case where this Court has held that a local activity not of itself commerce could be regulated where there was no specific connection between such activity and the movement of some medium of exchange in interstate commerce. In the *Filburn* case this Court recognized, and pointed out, that such activities as production, manufacturing, or mining can not be regulated by the Congress where no part of the product was intended for interstate commerce, or intermingled with the subjects thereof. It is evident that even in those cases such activities have an economic effect upon commerce. Nevertheless it is equally clear that they may not be regulated by the Congress unless such product is intended for ~~Congress~~ commerce or intermingled with identifiable subjects thereof.

In other cases, as for example *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, *Associated Press* v. *N. L. R. B.*, and the cases cited in the *Filburn* case, some flow of interstate commerce which could be identified was interrupted

or affected in a substantial way. To extend the doctrine to the field of speculation such as might be imagined or could happen in connection with service occupations—as banks, brokers, accountants, or lawyers—is to effectually obliterate the distinction between what is national and what is local, and create a completely centralized government. Cf. *N. L. R. B.* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1. That local activity might affect commerce is not enough.

In order to affect commerce within the meaning of the Act, the business of the bank, if stopped by a strike or other form of industrial strife or unrest, would have to burden or obstruct some commerce which could be identified. This is true of any local activity. It follows that the activity must be connected with a flow of commerce to affect it under the Act. To say that the activity might affect commerce will not do. What commerce might it affect? It is not enough to say the commerce of its depositors or others with whom it might or even does do business. The commerce must be identified before it can be said whether it is affected.

The argument that banking *per se* has an economic effect on interstate commerce so as to bring the business within the general scope of the commerce clause, proves too much. The same argument may be made as to educational institutions, brokers, accountants or lawyers. If the statement in the *Filburn* case is taken literally to include everything which might have a substantial economic effect on interstate commerce, then every kind and type of local activity is swept within the power of the Federal government, but the court, as shown, did not intend that it should be taken literally.

This case, as shown, involves thirteen policemen who guard persons and property in the banking premises of an

Illinois state bank engaged in a banking business under state law in Chicago, Illinois. They have no other duties. No showing has been made that they have anything to do with those activities which applicant claims might affect commerce, but on the contrary it is affirmatively shown by respondents that the policemen have nothing to do with any banking transactions. Their total removal would not affect the operation of the bank. In fact the bank must remain open for business during all business hours and under the law could not be closed.

The Board claims that by issuing letters of credit, accepting transit items, and providing foreign exchange through debit and credit balances with other banks, Petitioner Bank, a local bank in Chicago, in some way might affect commerce. What commerce it might affect is not shown. It is not enough to say that the bank might affect some unidentified flow of commerce, and it certainly would not be enough to say that the policemen might, by their presence in the bank, have some effect on some commerce which the bank might affect. If the bank does affect interstate commerce it could be alleged in the application and shown before the District Court, but it is not enough, as applicant contends, to simply demand an order to produce where one of the issues before the court is whether a question has arisen in interstate commerce. The Board has admitted upon this record that they do not know whether the bank is engaged in any business which affects commerce within the meaning of the National Labor Relations Act or the commerce clause of the Constitution.

III.

If, as a Matter of Construction, the National Labor Relations Act, in a Proceeding to Enforce Board Subpoenas in Connection With an Inquiry Under Section 9(c), Is Precluded from Inquiring into the Question as to Whether Petitioner Bank Is Engaged in Commerce or Its Activities Affect Commerce, the Act to That Extent Is Unconstitutional.

The conclusion expressed in the above heading is a necessary result from the decisions of this Court with respect to section 10.

The effect of the decisions below is to give to the Board not only initial jurisdiction to determine the question of coverage, or, here, as to whether Petitioner Bank is engaged in commerce, or whether its activities affect commerce, but also exclusive jurisdiction wholly without any opportunity to the employer to have the question of coverage judicially reviewed—notwithstanding that the Board itself has invoked the power and jurisdiction of the District Court to compel compliance with its subpoenas. It seems to us quite foreign to any proper conception of a constitutional government to say that when an administrative agency is attempting to exercise a jurisdiction, although conceding that it does not know whether jurisdiction exists at all, and it invokes the power of the District Court in aid of that asserted jurisdiction, or in reality for the purpose of finding out or determining whether it has jurisdiction, it may deny any right to the District Court to conduct any independent inquiry into the jurisdictional question. If the District Court passes its order of enforcement as a matter of course without any inquiry into coverage, then obviously the effect is to inferentially sustain the jurisdiction of the

Board to conduct the inquiry and to determine the question of its own jurisdiction free from any judicial review.

This Court in the *Myers* case saved the constitutionality of Section 10 by recognizing the right of judicial review given by that section in the case of an unfair labor practice proceeding. There is no such provision in Section 9(c), and unless the District Court in an enforcement proceeding like the instant one can inquire into the question of coverage and determine for itself as to whether Petitioner Bank is engaged in commerce, or whether its activities affect commerce, the Act to that extent would be unconstitutional under the principles enunciated in the *Myers* case.

IV.

State Banks Are Creatures of the Several States and Wholly Within the Control of the States Subject to Such Federal Control as May Be Exercised to Regulate the Public Finance.

(a) Under the Federal Constitution, Congress has the power to create a system of national banks, which power rests upon the constitutional premise that they are necessary instrumentalities of government to give effect to the express power to regulate the public finance. (*McCulloch* v. *Maryland, et al.*, 4 Wheat. 314; *Osborn, et al.* v. *The President, Directors and Company of the Bank of the United States*, 9 Wheat. 738; *Farmers' & Mechanics' National Bank of Dearing*, 91 U. S. 29.) National banks are instrumentalities of the federal government created for a public purpose and as such are necessarily subject to the paramount authority of the United States. (*Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *First National Bank of San Jose, California*, 262 U. S. 366.

Federal regulation of a state bank, as such, can not be

sustained under the commerce clause. Only can the federal government control a state bank as such to the extent necessary to regulate its fiscal operations under the clause granting power to regulate the public finance. The federal government, under the present state of the law, can not directly control the internal policies of a state bank with reference to its employer-employee relationships.

The mere fact that a state bank might in some way affect commerce would not give Congress the power to regulate the internal affairs of such banks, which as shown is left exclusively to the states. To extend the doctrine of the *Filburn* case to state banks as such on the theory that they may exert some economic effect on interstate commerce, would violate the Constitution in that Congress has no power or authority to regulate their internal affairs under Article I, Section 8, of the Federal Constitution. This would stretch the commerce power even beyond the breaking point.

The argument that a state bank as such has an economic effect upon interstate commerce so as to bring it within the general scope of the commerce clause, and that under such clause the employer-employee relationship may be regulated and controlled, may prove too much in fact, much too much. The same argument could be made as to brokers, accountants, lawyers and even educational institutions.

The *Filburn* case recognized the difficulty. The court there said: "That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it."

We submit that in such a situation, without any allegation or proof that the state bank affects interstate commerce, applicant is not entitled to demand the enforcement

of its subpoena under Section 11 of the National Labor Relations Act in conjunction with an investigation under Section 9 (c) of the Act. It was the court's duty to require proof of the jurisdictional fact which entitles the Board to an order enforcing its subpoena.

V.

The Subpoena Duces Tecum Is Too Broad and Amounts to an Unreasonable Search and Seizure.

In *Federal Trade Commission* v. *American Tobacco Co.* (1924), 264 U. S. 298, it was held that a governmental fishing expedition into the papers of a private corporation on possibility that they may disclose evidence is contrary to first principles of justice, if not defiant of the Fourth Amendment; that a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up will not be allowed. (pp. 305-6.)

The court said that the right of access given by the statute is to documentary evidence—not to all documents but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. (p. 306.)

In *Hale* v. *Henkel*, 201 U. S. 43, 77, it was held that evidence of the materiality of the papers demanded must be produced.

It is provided in the National Banking Act that no bank shall be subject to any visitorial powers other than such as are authorized by law (that of the Comptroller of the Currency) or are vested in the courts of justice, or such as shall be or shall have been exercised or directed by Congress or by either House thereof or by any Committee

of Congress or of either House duly authorized. U. S. C. Tit. 12, Sec. 484.

The Illinois statute provides that a bank shall not be subject to any other visitorial power (that of the State Auditor) than authorized by the Act except such as are vested in the several courts of law and chancery. (Ill. Rev. Stat. 1943, Ch. 16½, Sec. 8.)

Wholly aside from the specific statutory provisions, a subpoena *duces tecum* such as in this case, only a search for evidence, should be disallowed as against public policy, which is the basic reason for the existence of the statutes limiting visitorial powers as aforesaid. The public interest requires that this policy be not invaded.

The evidence including the books, records and documents sought under the subpoena *duces tecum*, must be relevant, material and necessary to the Board's investigation. It is claimed that they bear upon whether or not the operations of the bank affect commerce within the meaning of Sec. 2 (6) and (7) of the Act.

How could the total assets, investments in government securities, amount of outstanding loans and discounts, amount of deposits, number of depositors, amount of capital surplus and undivided profits, value and number of outstanding acceptances and letters of credit, or amount of investments in municipal securities, show that the banking activity affected commerce? And what commerce would be affected?

How could the value of transit items, letters of credit and travelers' checks, the value of foreign exchange business, or the names and locations of banks outside of the state where deposits were maintained, show any effect upon any flow of interstate commerce?

To show that these items exist, which are simply the ordinary contractual debits, credits, contracts and obliga-

tions of the banking business, would show no effect upon interstate commerce any more than the contractual obligations of brokers, lawyers or accountants would show an effect upon commerce within the meaning of the National Labor Relations Act.

The only other claim of materiality is as to the appropriate unit. Banking, as shown, is not commerce *per se* and unless it is shown that the local activity substantially affects some flow of interstate commerce, it would not appear that any question with respect to representation had arisen in commerce, and evidence as to the appropriate bargaining unit would be wholly incompetent, irrelevant and immaterial.

The affidavit of Mr. Wilson filed in support of the Answer and Amended Answer not only shows that the subpoena *duces tecum* amounts to an unreasonable search and seizure, but that the evidence has no materiality to the issue involved. (R. 50.)

In order to obtain any of the evidence, the Board, on its own theory of the case, would have to show that it is material—that is evidence that the bank affects commerce within the meaning of the Act. The same question arises here as is discussed in Point II of this Brief. Upon the admission of the Board that it did not know that the bank affected commerce the subpoena could only have been issued to find out if any of the evidence sought was material, contrary to the express holding in the above cited cases.

The language of Mr. Justice Murphy in his dissenting opinion in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 512, is of interest here. He said:

> "This Court, in recognition of the drastic nature of the subpoena power and the possibilities of severe mischief inherent in its use, has insisted that it be

kept within well-defined channels. Cf. *Boyd* v. *United States*, 116 U. S. 616; *Hale* v. *Henkel*, 201 U. S. 43; *Federal Trade Comm'n.* v. *American Tobacco Co.*, 264 U. S. 298; *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363. * * * Congress evidently intended to keep the instant subpoena power within limits, and clearly must have meant for the courts to perform more than a routine ministerial function in passing upon such applications. If this were not the case, it would have been much simpler to lodge the power of enforcement directly with the Secretary, or else to make disregard of his subpoenas a misdemeanor. * * *."

Respectfully submitted,

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